

In the United States Court of Appeals

For the Ninth Circuit

BOOTH-KELLY LUMBER COMPANY, a Corporation,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee,

AND

SOUTHERN PACIFIC COMPANY, a Corporation,
Cross-Appellant,

vs.

BOOTH-KELLY LUMBER COMPANY, a Corporation,
Cross-Appellee.

Appeal and Cross-Appeal from the United States District Court
for the District of Oregon

HONORABLE JAMES ALGER FEE, *Judge*

REPLY BRIEF OF CROSS-APPELLANT

KOERNER, YOUNG, SWETT & McCOLLOCH,
JAMES C. DEZENDORF,
ALFRED H. CORBETT,

800 Pacific Building, Portland, Oregon,
Attorneys for Cross-Appellant and Appellee

VEAZIE, POWERS & VEAZIE, and
JAMES ARTHUR POWERS,

611 Corbett Building, Portland, Oregon,
Attorneys for Cross-Appellee and Appellant.

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No. 12340

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REPLY BRIEF OF CROSS-APPELLANT

PRELIMINARY STATEMENT

(Cross-Appellant is referred to herein as "Southern Pacific" or "Railroad" and Cross-Appellee is referred to as "Booth-Kelly" or "Industry".)

This is a case arising out of an industrial spur track agreement, which was occasioned by Southern Pacific's being requested to undertake services not required of it

by statute and to thereby run the risk of liability which it could not have been forced to assume by law. The Railroad was asked to run across property "used or owned by defendant" (T. 51), in other words, to run through property the control of which was in Booth-Kelly's hands. Under these circumstances it was reasonable that Southern Pacific should exact as the quid pro quo for its undertaking, that Booth-Kelly would respect the specified clearance distances and would save Southern Pacific harmless from any liability arising out of some act of Booth-Kelly on that land or caused by the omission by Booth-Kelly of its duties in connection with the premises over which Southern Pacific was to operate.

Booth-Kelly breached that agreement by placing the cart dangerously close to the track and by omitting to remove it, although trains were operating over the track. The accident arose out of the placement of an obstruction in violation of specific agreement, which obstruction was under the control of Booth-Kelly. As a result, Southern Pacific has been obliged to pay damages to its employee Powers.

What is concerned in this appeal is the responsibility for the accident as between Southern Pacific and Booth-Kelly under the provisions of the industrial track agreement. This fundamental point is often overlooked in Booth-Kelly's answering brief, where in many instances cases are used and arguments made as if no agreement were in existence. The question of ultimate responsibility as between the parties may be entirely altered by con-

tract. Since a contract exists in the present case, its provisions must be laid over the factual base to bring out the ultimate pattern of responsibility.

SPECIFICATION OF ERROR NO. 1 BREACH OF CONTRACT

Summary of Argument

Booth-Kelly cannot escape liability for damages for breach of contract by setting up the determination in the Powers case, since recovery in that action was the natural and necessary result of the breach of contract.

Booth-Kelly's promise to observe the minima prescribed clearances was one of the bargained for considerations given in exchange for Southern Pacific's agreement to operate over the industrial spur track, crossing land owned or used by Booth-Kelly.

Southern Pacific's agreement to give service on that track was valid consideration for Booth-Kelly's promises since the railroad was not obligated by law to go beyond the switch connection on its own right of way. (S. P. Brief pp. 34-40).

49 U.S.C.A. Sec. 1 (9),
Luton Mining Co. v. Louisville & N. R. Co., 276
Ky. 321, 123 S. W. (2d) 1055.

No issue was raised in the trial court concerning the private nature of the track (Finding of Fact No. 2, T. 51), hence Section 1 (22) of 49 U.S.C.A. has no application. It applies only to tracks built and operated by a railroad as a part of its own system, not to private tracks operated under agreement.

The loaded wood cart constituted "material" and an "obstruction" which was "stored or maintained" in violation of the provisions of Section 5 of the agreement. (S. P. Brief p. 49). The cart hurt Powers. It was placed and maintained in position by Booth-Kelly. The location selected for the cart violated the minima for clearances in the agreement. The causal chain between the injury and the defendant is unbroken. The initial placing was wrongful. The lapse of time could not minimize the breach.

Southern Pacific was entitled in undertaking to serve over Booth-Kelly's spur track to protect itself against the risks to which it exposed itself. 9 *Am. Jur. Carriers*, Sec. 737. It could reasonably assume that accidents would occur if clearance lines were violated. The trial court correctly found that the damage to Powers and the liability of Southern Pacific was the natural and necessary result of Booth-Kelly's breach of contract in violating those clearances. (Finding of Fact No. 13, T. 53-4).

Southern Pacific is entitled to recover the amount of damages obtained from it by its employee, and the costs of defending the action, since such recovery and costs were reasonably within contemplation of the parties at the time of making the contract.

Booth-Kelly cannot by technical arguments avoid the consequences of its breach of contract.

Neither waiver nor estoppel is applicable to this case (S.P. Brief pp. 50-51).

The provision permitting Southern Pacific to cease operations over the track was for the railroad's protec-

tion. Booth-Kelly cannot make use of that provision to avoid the consequences of its own wrongful act. It could have removed the cart at any time and thus cured its breach and avoided liability.

Although the trial court concluded that the matter of control over the spur track had no material bearing on the determination of the case (Conclusion of Law No. 4, T. 55) Booth-Kelly seeks at inconsistent intervals to make much of the point. (B.-K. Answer Brief pp. 8, 13). Counsel apparently forgets his reference on page 25 of Booth-Kelly's opening brief to the California court's determination that Southern Pacific had no right to remove the cart.

SPECIFICATION OF ERROR NO. 2 ENFORCEMENT OF INDEMNITY PROVISIONS POINT ONE

Summary of Argument

The Powers action established only that Southern Pacific failed to provide its employee with a safe place in which to work and did not determine the ultimate responsibility as between the parties to this action. Booth-Kelly was responsible under the agreement for Southern Pacific's failure to provide a safe place to work.

In this action, where recovery is sought under an indemnity provision in a contract, the action must of necessity be predicated on loss or damage first suffered by Southern Pacific. That loss was suffered by reason of Powers' recovery in the California action. The parties are here litigating the question of ultimate responsibility for that loss.

The Powers case was concerned only with a determination of Southern Pacific's responsibility to its employee under the Federal Employers Liability Act, and with the amount of damage suffered by Powers. It was determined there that Southern Pacific had breached its statutory duty of providing its employee with a safe place within which to work.

No question of relative responsibility as between Southern Pacific and Booth-Kelly was there determined since Booth-Kelly was not a party to that action. Hence there could not have been a determination, contrary to Booth-Kelly's argument, that Southern Pacific was *solely* responsible for the accident.

Neither was there discussion nor application of the spur track agreement, since that issue was not material to the trial of Powers' claim. The application of the agreement to the facts was left for determination in this action between the parties to the contract.

The Powers case did establish Booth-Kelly's responsibility for the presence of the cart. It is an admitted fact and it was found by the trial court that the wood-cart was the property of Booth-Kelly and had been placed or left by it or its employees alongside the track on premises owned or used by Booth-Kelly (T. 34, 52).

Since the findings of the trial court that Booth-Kelly's negligence constituted the primary cause of the injury to Powers are consistent with the facts and are not in conflict with the determinations in the Powers case, no error

was committed in entering Findings of Fact 9 and 10. *Fed. Rules of Civ. Proc.* 52 (a).

Booth-Kelly has not been successful in distinguishing the Oregon cases cited in Southern Pacific's opening brief.

In *Astoria v. Astoria & Columbia River R. Co.*, 67 Or. 538, 136 Pac. 645, although the city could not by contract prevent recovery for the city's failure to care for the safety of the travelling public, it was able by contract to shift the ultimate responsibility for Mrs. Anderson's injuries to the railroad. Here, while Southern Pacific could not by contract prevent recovery against it for failing to provide a safe place within which to work, it did by contract place upon Booth-Kelly the ultimate responsibility for Powers' injuries. There the city was held liable by reason of its failure to enforce an ordinance. Here Southern Pacific was held liable for failing to enforce a contract requiring Booth-Kelly to observe clearance lines.

Since no determination was made either in the Powers case or by the trial court that Southern Pacific was *solely* negligent, but on the contrary it was found that Booth-Kelly was negligent and its negligence was the "active, direct, proximate and primary cause" of the injury to Powers, the attempt to minimize the dictum from *Southern Pacific Company v. Layman*, 173 Or. 273, 145 P. (2d) 295, likewise fails. (S. P. Brief p. 16).

The *Layman* case arose on demurrer to plaintiff's allegations that the indemnitee railroad suffered loss *solely* by reason of its own negligence, a situation which does not apply here. As stated in Southern Pacific's

opening brief at page 16, the Oregon court indicated that in a case where the contract created a duty in the indemnitor, "his negligent failure to discharge that obligation might be the primary cause of an accident * * * which would result in injury to passengers and a consequent liability to the defendant (railroad)." In such a case, the indemnity provision might be evoked.

Thus the trial court's finding of primary responsibility against Booth-Kelly is supported by Oregon law, and should not be disturbed.

Although counsel cites cases from other jurisdictions, they cannot of course take the place of Oregon law. Furthermore it is impossible to divorce, as counsel attempts, the question of ultimate responsibility from the agreement entered into between the parties. While the cases involving liability to third persons or employees might be determinative of an appeal in the Powers case, they are not helpful in deciding the responsibility as between Booth-Kelly and Southern Pacific under the agreement.

POINT TWO

Summary of Argument

It was error for the trial court to make a finding of concurrent negligence on grounds not made an issue in the Pre-trial Order.

Although the Pre-trial Order contained detailed charges of negligence against Southern Pacific (T. 36-44) the trial court found that Southern Pacific was not negli-

gent in the form of the specifications there set out. Since the injury to Powers was not caused by any negligent act as charged in the Pre-trial Order, and was not caused by the continuing of operations after Southern Pacific's employees observed the position of the cart, we fail to ascertain any evidence in the record supporting the Court's 14th Finding of Fact.

POINT THREE

Summary of Argument

The application of the joint or concurring negligence clause of the indemnity provision is limited to situations where Booth-Kelly's duty was not fixed by contract.

Under the industry track agreement Booth-Kelly was obligated to observe clearance minima. This it did not do, and its negligent failure in this regard and specific breach of its contractual duty was the primary cause of the injury to Powers. To limit recovery against Booth-Kelly to one-half in such situations would ignore the contract provision placing on Booth-Kelly the duty to maintain clearance distances free from obstructions. Such a holding would be inconsistent with the intent of the parties.

Salt River Valley Water User's Ass'n. v. Cornum, 49 Ariz. 1, 63 P. (2d) 639, is not in point since no agreement was involved.

Far from holding Southern Pacific solely negligent, the instant case establishes Booth-Kelly responsible for the injury to Powers. (Finding of Fact No. 10, T. 53).

Hence the discussion in *Deep Vein Coal Co. v. Chicago E. I. R. Co.*, 71 F. (2d) 963, is in point. (S. P. Brief p. 18).

POINT FOUR

Summary of Argument

Booth-Kelly is bound by all matters determined in the Powers case. The amount of damages there determined were in excess of the \$44,699.46 settlement.

Under authority of *Astoria v. Astoria & Columbia River R. Co.*, 67 Or. 538, 136 Pac. 645, Booth-Kelly is bound by the determination in the California action that Powers suffered injuries in the sum of \$46,100.00. Booth-Kelly is not hurt by the settlement for a lesser amount. (See P. T. Order VI, T. 35).

Counsel's attempt to distinguish the *Astoria* case is not persuasive. Depending upon the point involved, Booth-Kelly has argued (1) the judgment in the prior action is conclusive of the facts thereby established (B.-K. Opening Brief p. 16), (2) the damages are not *res judicata* although the verdict and judgment are *res judicata* as to negligence. (B.-K. Answer Brief p. 35).

SPECIFICATION OF ERROR NO. 3

Summary of Argument

Recovery is permitted independent of contract where one tort-feasor is primarily negligent and the other secondarily so.

Under this point we have cited authorities showing the extent to which the Oregon court, and courts in other jurisdictions have gone in allowing recovery to one held liable for tort, independent of any contractual right.

Astoria v. Astoria & Columbia River R. Co., 67 Ore. 538, 136 Pac. 645, cites with approval *Lowell v. Boston & Lowell R. Corp.*, 23 Pick. 24. In *Fidelity & Cas. Co. of N. Y. v. Chapman*, 167 Or. 661, 120 P. (2d) 223, the court takes pains to point out that action it was deciding was “* * * not a case where one tort-feasor is primarily negligent and the other secondarily so.” By so doing it left the door open for contribution in such cases.

See also *Hudson Valley Ry. Co. v. Mechanicville E. L. & G. Co.*, 180 App. Div. 86, 167 N.Y.S. 428, commented on in Southern Pacific’s answer brief p. 27.

CONCLUSION

The question here involved is the ultimate responsibility under the spur track agreement for the injury to Powers and resultant liability of Southern Pacific. Under the agreement Booth-Kelly was primarily responsible for maintaining the clearance lines free from obstruction. Since the placing of the cart was not only in violation of

contract but was the primary cause of the injury to Powers, Southern Pacific is entitled to recover under the contract the full amount of \$44,699.46 judgment costs and \$1869.53 costs and attorneys' fees. Insofar as it fails to award these amounts the judgment appealed from should be modified.

Respectfully submitted,

KOERNER, YOUNG, SWETT & MCCOLLOCH,

JAMES C. DEZENDORF,

ALFRED H. CORBETT,

Attorneys for Cross-Appellant.